Supreme Court, U.S.
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No. 93-2099

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1993

A.G. Edwards, Jr., Petitioner
v.
First American Title Insurance Company, John Hancock Mutual Life Insurance Company, et al., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS FIRST AMERICAN TITLE INSURANCE COMPANY, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, HAROLD PEARSON III, WILLIAM GORDON, JOHN G. MCELWEE, STEPHEN BROWN, THOMAS L. MCKIERNAN, AND ARTHUR DUNCAN IN OPPOSITION TO PETITION

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July 26, 1994

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CORPORATE DISCLOSURE STATEMENT

Defendant First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a California corporation which has issued shares to the public. First American Title Insurance Company does not have any other parent companies or subsidiaries that have issued shares to the public.

Defendant John Hancock Mutual Insurance Company is a mutual insurance company that is owned by its policyholders. The following is a list of its subsidiaries and affiliates that have issued shares to the public:

Delmar Petroleum, Inc.
Delta & Pine Land Co.
Gulf States Gas Pipeline Co.
Holmes Protection Group, Inc.
Hotel Property Holdings, Inc.
Nahama & Weagant Energy Co.
P.T. Asuransi Pensun Bumiputera
National Electronic Information Corp.
International Human Resources

Development Corp.
Dallas Gas & Electric
British American Life
Insurance Berhad
The Interlife Assurance Co., Ltd.
Energy Investors Mgmt., Inc.
Balanced Planning
Insurance Agency, Ltd.
British American Life Assurance
Company Pte., Ltd.
First Signature Bank & Trust
John Hancock International
Services, S.A.
John Hancock International
Services Pte., Ltd.

QUESTIONS PRESENTED

1. Did the court of appeals err as a matter of law in ruling that the plaintiff's claims against the non-corporate defendants should be dismissed and could not be transferred to another federal district court, where the district court in which the claims were brought did not have personal jurisdiction over the non-corporate defendants and all applicable statutes of limitations had expired before the non-corporate defendants were made parties to the litigation?

2. Under the foregoing circumstances, did the court of appeals err as a matter of law in declining to rule that the district court should exercise personal jurisdiction over all defendants under 18 U.S.C. § 1965(b)?

STATEMENT OF THE CASE

The following facts were alleged by the plaintiff in his complaint and amended complaint and were cited by the trial court in its order dated March 12, 1993. For purposes of the petition for a writ of certiorari only, the defendants do not dispute these facts.

In 1973, the plaintiff-petitioner, A.G. Edwards, Jr., and two other persons organized a partnership, Saval Ranching Company ("Saval"), to purchase and operate two commercial cattle ranches in Nevada. In 1975 and 1976, Saval borrowed approximately $1,500,000 from John Hancock Mutual Life Insurance Company ("John Hancock"), secured by deeds of trust on the ranches. The deeds of trust were executed by Saval, John Hancock, and First American Title Insurance Company ("First American") as John Hancock's trustee. Subsequently, the United States

Department of Agriculture loaned money to Saval, secured by deeds of trust on the same ranches. See Appendix C at 20.

In 1983, Saval became delinquent on the notes to John Hancock. In 1985, the plaintiff became the sole owner of Saval. In 1985, John Hancock, through its trustee, First American, foreclosed on the ranches. Hawkins, Rhodes & Sharp ("HR&S"), a Nevada law firm, and Prince A. Hawkins ("Hawkins"), a partner in HR&S, acted as legal counsel for John Hancock in connection with the foreclosure proceedings. See id.

The deeds of trust securing John Hancock's loans expressly included the mineral, gas and oil rights of the properties. In preparing for the foreclosure sale, however, First American excepted the mineral, gas and oil rights from the published description of the properties to be sold. The plaintiff

attended the foreclosure sale but was not allowed to bid on the properties. The United States purchased the properties at the foreclosure sale for $1,231,915.60 and acquired the release of John Hancock's interest in the properties. The United States then brought suit against the plaintiff in the United States District Court for the District of Nevada to recover a $600,000 deficiency. See id.

On January 5, 1998, the Nevada court ruled that First American had violated Nevada's foreclosure statutes by excepting the mineral, gas and oil rights from the published description of the properties, and invalidated the foreclosure. In 1989, the United States and the plaintiff entered into a settlement agreement pursuant to which the plaintiff paid $400,000 to the United States and the United States transferred to the

plaintiff all its interests in the properties. See id. at 20-21.

On January 25, 1991, the plaintiff filed suit against John Hancock in the United States District Court for the District of Massachusetts. The suit, which included claims for negligence and for breach of contract, sought damages for the underinclusive property description in the notices of the foreclosure sale of the Saval ranches. The district court dismissed the negligence claim as time-barred, and dismissed the contract claim on the merits. On September 4, 1992, the United States Court of Appeals for the First Circuit affirmed the dismissal of the negligence claim, vacated the dismissal of the contract claim, and remanded for further proceedings. See Edwards v. John Hancock Mut. Life Ins. Co., 973 F.2d 1027 (1st Cir. 1992).

Independent of his action in the federal district court in Massachusetts, the plaintiff commenced the present action on August 12, 1991, by filing a complaint against First American Title Insurance Company of Nevada ("First American Nevada"), a Nevada corporation, in the United States District Court for the District of New Hampshire. The complaint alleged breach of contract and negligence arising out of the foreclosure sale. See Appendix D.

On June 2, 1992, the plaintiff filed an amended complaint which substituted First American, a California corporation, for First American Nevada. In addition, the amended complaint added nine defendants: John Hancock; HR&S; Hawkins; and Harold Pearson III, William Gordon, John G. McElwee, Steven Brown, Thomas L. McKiernan and Arthur Duncan (collectively, the

"individual Hancock defendants"). See Appendix E.

On March 23, 1993, the district court in New Hampshire issued an order (1) dismissing the claims against the eight non-corporate defendants for lack of personal jurisdiction, (2) granting John Hancock's motion to dismiss because the plaintiff's prior action against John Hancock remained pending in the district court in Massachusetts, and (3) granting First American's motion to transfer the claim against it to the United States District Court for the District of Nevada.

On July 8, 1993, the district court issued an order which denied the plaintiff's motion for reconsideration. On July 9, 1993, the district court entered a final judgment for the individual Hancock defendants, John Hancock, HR&S and Hawkins.

The plaintiff filed a notice of appeal to the United States Court of Appeals for the First Circuit on August 6, 1993. On March 29, 1994, the court of appeals affirmed the district court's judgment in its entirety.

The plaintiff filed his petition for a writ of certiorari with this Court on June 26, 1994. In his petition, he has sought review only of the order dismissing the action against the eight non-corporate defendants for lack of personal jurisdiction. He has not sought review of the order to the extent that it dismissed the action against John Hancock and transferred the claim against First American to the district court in Nevada. Thus, the only issue presented here is whether the claims against the non-corporate defendants were properly dismissed.

In his appeal to the First Circuit, the plaintiff did not dispute the district court's finding that it did not have personal jurisdiction over the non-corporate defendants.[1] Rather, he argued that, if the district court in New Hampshire did not have jurisdiction, it should have transferred the claims to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1631. See Appendix A at 5-6. The court of appeals rejected this argument because it found that, in addition to the absence of personal jurisdiction, all of the claims against the non-corporate defendants were barred by the applicable statutes of limitations. It is

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[1] In a letter written to the court of appeals after he filed his brief, the plaintiff argued for the first time that the district court could assert jurisdiction over all defendants under 18 U.S.C. § 1965(b).

this ruling that the plaintiff now challenges.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because there are no special or important reasons for granting it. The court of appeals simply applied settled law to the undisputed facts of the case. There are no novel or complicated legal or factual issues, nor is the court of appeals' decision inconsistent with the decisions of any other United States court of appeals, of any relevant state court of last resort, or of this Court.

The court of appeals properly determined that all of the plaintiff's claims against the non-corporate defendants were barred by the applicable statutes of limitations, because those defendants were first named as parties in the plaintiff's amended complaint, which was filed more than

six years after the causes of action accrued. The court also properly determined that--although the plaintiff never raised the issue--the plaintiff's amended complaint did not relate back to the time the original complaint was filed. Finally, the court correctly ruled that subsequent losses allegedly suffered by the plaintiff in 1990 as a result of the same acts of the defendants did not move forward the date on which his causes of action accrued. Based on these rulings the court correctly held that, because the actions were time-barred, the claims could not be transferred to another federal district court, and must therefore be dismissed.

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL HANCOCK DEFENDANTS SHOULD BE DISMISSED AND COULD NOT BE TRANSFERRED PURSUANT TO 28 U.S.C. § 1631.

The district court correctly dismissed the action against the individual Hancock defendants for lack of personal jurisdiction in New Hampshire. See Appendix C at 21-24. The plaintiff did not appeal the court's ruling that it did not have personal jurisdiction. Instead, the plaintiff appealed the district court's decision not to transfer his dismissed claims against the individual Hancock defendants to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1631. The court of appeals properly rejected this argument because the plaintiff's claims against the individual Hancock defendants were barred by the applicable statutes of limitations.

A. The Plaintiff's Claims Against the Individual Hancock Defendants Are Barred by the Applicable Statutes of Limitations and Therefore Cannot Be Transferred to a Court that Has Personal Jurisdiction over the Defendants.

A federal court which lacks jurisdiction over an action may not transfer the action to another federal court pursuant to 28 U.S.C. § 1631 if the action is time-barred in the federal courts. Hays v. Postmaster General, 868 F.2d 328, 331 (9th Cir. 1989); Hardesty v. Benefits Review Board, 783 F.2d 138, 139 (8th Cir. 1986); Billops v. Department of the Air Force, 725 F.2d 1160, 1163 (8th Cir. 1984) ("A transfer can remedy the mistake of filing in the wrong court, but not the mistake of filing in an untimely manner.").

There is no dispute that the event about which the plaintiff complains--the allegedly defective foreclosure sale of his Nevada property--took place on August 15,

1985. Thus, the date from which the applicable statutes of limitations began to run is August 15, 1985. Any claims which the plaintiff wanted to assert against the individual Hancock defendants had to be made within the applicable limitations period starting from this date of accrual.

The plaintiff filed his amended complaint--which named the individual Hancock defendants as defendants in this action for the first time--on June 2, 1992. This was over six years and nine months after the date on which any cause of action accrued against the individual Hancock defendants. None of the causes of action asserted by the plaintiff has a limitations period that exceeds six years.

In diversity cases, federal courts apply the statute of limitations that a court of the forum state would apply. See Keeton v. Hustler Magazine, Inc., 465 U.S.

770, 779 & n.10 (1984); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Gonsalves v. Flynn, 981 F.2d 45, 47-49 (1st Cir. 1992). Thus, the New Hampshire statute of limitations ordinarily applies to actions brought in the United States District Court for the District of New Hampshire. If the plaintiff's claims against the individual Hancock defendants were to be transferred to the federal district court in Nevada or Massachusetts, it is not necessarily clear whether the New Hampshire statute of limitations, or the Nevada or Massachusetts statute of limitations, would apply.[2]

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[2] The United States Court of Appeals for the Ninth Circuit, in which Nevada is located, holds that the state law of the transferor forum applies to § 1404(a) transfers but that the state law of the transferee forum applies to § 1406(a) transfers. Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983); accord Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980). The United States District Court for the District of Massachusetts holds that the statute of limitations of the

However, regardless of whether the New Hampshire, Massachusetts, or Nevada statute of limitations were to be applied, all of the plaintiff's actions against the individual Hancock defendants are time-barred.

In the amended complaint, the plaintiff asserted five different causes of action: (1) a contract action, see Amended Complaint ¶ 12, Appendix E at 40; (2) an action based on breach of an implied covenant of good faith and fair dealing, see id. ¶ 66, Appendix E at 53; (3) an action under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced and Corrupt Organizations Act (RICO), see id. ¶ 9, Appendix E at 39; (4)

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transferor forum applies to § 1404(a) transfers. Tidgewell v. Loon Mountain Recreation Corporation, 820 F. Supp. 630, 633 (D. Mass. 1993); accord Gonzalez v. Volvo of America Corp., 734 F.2d 1221 (7th Cir. 1984); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979).

an action under Massachusetts General Laws ch. 93A, the Massachusetts Consumer Protection Act, see id. ¶ 10, Appendix E at 26; and (5) an action under Nevada Revised Statutes §§ 41.6000, 598.410-413, and 598.490, pertaining to deceptive trade practices, see id. ¶ 11, Appendix E at 39-40.

In New Hampshire, the limitations period for an action upon a contract that arose before July 1, 1986, was six years. N.H. Rev. Stat. Ann. 508:4, I (1983 & Supp. 1993).[3] In Nevada, the limitations period for a contract action not founded upon an instrument in writing is four years, Nev. Rev. Stat. § 11.190 2(c) (Supp. 1991), and the limitations period for a contract action

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[3] Personal actions arising on or after July 1, 1986, have a limitations period of three years. See N.H. Rev. Stat. Ann. 508:4, I (Supp. 1993). It is not disputed, however, that the plaintiff's cause of action, if any, arose in 1985.

founded upon an instrument in writing is six years, id. § 11.190 1(b). In Massachusetts, the limitations period for a contract action is six years. Mass. Gen. L. ch. 260 § 2 (1992). Accordingly, the plaintiff's contract action is time-barred.

In New Hampshire, the limitations period for an action based on breach of an implied covenant of faith was six years for actions arising before July 1, 1986. N.H. Rev. Stat. Ann. 508:4, I (Supp. 1992). In Nevada, the period is four years. Nev. Rev. Stat. § 11.190 2(c) (Supp. 1991); David v. State Farm Fire & Cas. Co., 545 F. Supp. 370, 372 (D. Nev. 1982). In Massachusetts, the period is six years. Mass. Gen. L. ch. 260 § 2 (1992). Accordingly, the plaintiff's action for breach of an implied covenant of good faith is time-barred.

The limitations period for a civil RICO enforcement action, which is established by

the Clayton Act, is four years, regardless where the action is brought. Agency Holding Corp. v. Malley Duff & Associates, Inc., 483 U.S. 143, 156 (1987). Consequently, the plaintiff's civil RICO action is time-barred.

The limitations period for an action brought under Mass. Gen. L. ch. 93A is four years. Mass. Gen. L. ch. 260 § 5A (1992). Thus, the plaintiff's action under Mass. Gen. L. ch. 93A is time-barred.

Finally, the limitations period for an action brought under the Nevada deceptive trade practices statute is four years. Nev. Rev. Stat. § 598A.220 (1986). Thus, the plaintiff's action under the Nevada deceptive trade practices statute is time-barred.

In short, none of the actions brought by the plaintiff against the individual Hancock defendants was brought within the

applicable limitations period. In fact, the plaintiff admitted at the district court level and in his brief to the court of appeals that all statutes of limitations for his claims had expired by August 15, 1991. See Appendix A at 8. Accordingly, the plaintiff's claims against the individual Hancock defendants were time-barred in every federal court to which they might have been transferred when he filed his amended complaint on June 2, 1992.

The plaintiff might have argued that his amendment to the complaint "related back" to the date of the original complaint under Rule 15(c), so that the claims that were subject to a six-year statute of limitations were not barred. However, the plaintiff never raised this argument in either the district court or the court of appeals (although the defendants addressed the issue), nor has he raised the issue

here. He therefore has long since waived the argument. Moreover, the court of appeals did address this issue and properly concluded that there would be no merit to the argument even if the plaintiff had not waived it. See Appendix A at 9-10.

B. The Subsequent Injury Allegedly Suffered by the Plaintiff in 1990 Did Not Change the Accrual Date for His Causes of Action.

Although the plaintiff acknowledged at the district court level and in his brief to the court of appeals that his causes of action accrued on August 15, 1985, and thus became barred no later than August 15, 1991, he sought to retreat from that acknowledgment in his reply brief. There, he stated that his causes of action did not accrue until "mid-1990," when the United States Forest Service allegedly canceled his grazing permit for livestock on the Saval ranches. See Appendix A at 8. He alleged

that this cancellation "[d]irectly derived from" the defective foreclosure sale and caused him substantial economic harm.

The court of appeals properly rejected this argument, observing that

> Edwards was on notice of possible substantial injury as of the August 1985 foreclosure sale, when the underinclusive property description may have caused the Saval ranches to be sold for a lower price. A cause of action accrues when a plaintiff has "knowledge, actual or attributed, of both harm to it and the likely cause of such harm, . . . sufficient to stimulate further inquiry which was likely to alert it to a cause of action against a defendant." The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action.

Id. (citations omitted) (quoting Hanson Housing Auth. v. Dryvit System, Inc., 29 Mass. App. 440, 446, 560 N.E.2d 1290, 1294 (1990), review denied, 409 Mass. 1101, 565 N.E.2d 792 (1991), and citing Rowe v. John Deere, 130 N.H. 18, 21-23, 533 A.2d 375,

376-78 (1987); Sorensen v. Pavlikowski, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978)).

II. THE DISTRICT COURT DOES NOT HAVE JURISDICTION UNDER 18 U.S.C. § 1965(b).

Approximately one month after he filed his brief in the court of appeals, the plaintiff sent a letter to the court in which he asserted, for the first time, that the district court in New Hampshire should have exercised jurisdiction over all of the defendants under 18 U.S.C. § 1965(b), because the action included a claim under 18 U.S.C. § 1964, and the court unquestionably had personal jurisdiction over one of the defendants, John Hancock. In his petition for certiorari, he has again raised that issue. He appears to acknowledge, however, that jurisdiction under section 1965(b) becomes an issue only if he can overcome the statute of limitations hurdle.

Section 1965(b) states:

> In any action under section 1964 . . . in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned . . . .

18 U.S.C. § 1965(b). Apart from the fact that this argument was waived by the plaintiff's failure to raise it in the district court or in his notice of appeal, the plaintiff never explained why the "ends of justice" would require the district court in New Hampshire to assert jurisdiction over six non-New Hampshire residents when the plaintiff already had an action pending in Massachusetts based on the same facts.

Moreover, as the plaintiff appears to acknowledge, this issue is rendered moot if the actions were barred by the statutes of limitations. Since the claims were not filed in a timely manner, the question of

whether the district court in New Hampshire might have had jurisdiction over the non-corporate defendants is merely academic.

III. THE COURT'S RULING WAS IN ACCORDANCE WITH LAW, AND DOES NOT RAISE ANY NEW ISSUES.

The plaintiff's stated reason for the Court to grant certiorari seems to be summarized in the following sentence from his writ: "[T]here clearly exists within the Federal Court System a disharmony and potential for substantial injustice, where unforeseen subsequent and consequential injuries are denied redress because a relevant and originating Statute of Limitations period has expired.." Petition at 21. Apparently, the plaintiff objects to the concept that the limitations period for his cause of action begins to run at the time he becomes aware of an injury to him, even though he may subsequently discover a

further injury resulting from the same cause.

Although the plaintiff may not like this result, it is a result based on settled law and sound rationale. Notwithstanding the plaintiff's claim that "State Court decisions . . . cannot control an Appeals Court determination when neither State Court Action has ever been heard on Federal Appeal," see Petition at 18, the long-settled rule is that, in a diversity case, a federal court will apply the statute of limitations that a court of the forum state would apply. See page 14, supra. As stated above, the statutes of limitations of New Hampshire, Massachusetts, and Nevada would all bar the plaintiff's actions against the individual Hancock defendants. Consequently, the court of appeals was merely following established law when it

ruled that the plaintiff's action was barred.

The plaintiff's equitable argument for reversing the court of appeals' order, see Petition at 19-23, appears to be based solely on the fact that the order resulted in the dismissal of his claims. That, of course, is exactly the purpose of a statute of limitations. The fact that one party is unhappy with the result is not a justification for changing the law.

Finally, the plaintiff's argument that he should "have his unskilled appearance treated with more generous tolerance," see id. at 22, is not persuasive. While it may be true that pleadings of a pro se litigant are "[h]eld to less stringent standards than formal pleadings drafted by lawyers," Haines v. Kerner, 404 U.S. 519, 520 (1972), this cannot justify disregarding a statute of limitations merely because the plaintiff is

not represented by counsel. Otherwise, any plaintiff who has missed the filing deadline could avoid the statute of limitations merely by choosing to proceed without counsel.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATION

I hereby certify that three copies of the foregoing brief have this date been forwarded to A. G. Edwards, Jr., Box 208, RR #1, Bennington Battle Trail, Wilton Center, NH 03086, and Martha V. Gordon, Esquire, Nelson, Kinder, Mosseau & Gordon, P.C., 99 Middle Street, Manchester, NH 03105.